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Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1996

Michael Pringle,
Petitioner,

v.

Terrance M. Wolfe, as Town Justice of the Town of Walworth, Richard M. Healy, as District Attorney of the County of Wayne, and Patricia B. Adduci, as Commissioner of Motor Vehicles of the State of New York,
Respondents.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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51 pp

QUESTION PRESENTED

Is New York State Vehicle and Traffic Law § 1193(2)(e)(7), which provides for the suspension of a driver's license without notice following an arrest for Driving While Intoxicated, *per se*, and does not permit the motorist to offer evidence before the court makes its findings upon minimal proof, violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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PETITION FOR A WRIT OF CERTIORARI

Michael Pringle respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New York State Court of Appeals entered in this case on June 28, 1996, in order to resolve a conflict which now exists on the issue of Notice and Hearing between the New York State Court of Appeals and this Court.

OPINIONS BELOW

The opinion of the New York State Court of Appeals is reported at 88 N.Y.2d 426, —N.Y.S.2d—, —N.E.2d— (1996) and is reprinted in the Appendix at App. 1-11. The opinion of the Trial Court declaring the statute unconstitutional was unreported. It is reprinted herein at App. 12- 20. The decision of the Trial Court granting a preliminary injunction is reported at 164 Misc. 2d 733, 625 N.Y.S.2d 879 (Sup. Ct. Wayne Co. 1995) and is reprinted herein at App. 21 - 27.

JURISDICTION

The New York State Court of Appeals entered its judgment on June 28, 1996 (App. 11).

Pursuant to Supreme Court Rule 13(1) this petition has

been filed within 90 days after entry of the judgment of a state court of last resort.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTORY PROVISION INVOLVED

New York State Vehicle and Traffic Law § 1193(2)(e)(7) provides:

> **(7) Suspension pending prosecution**; excessive blood alcohol content. a. A court shall suspend a driver's license, pending prosecution, of any person charged with a violation of subdivision two or three of section eleven hundred ninety-two of this article who, at the time of arrest, is alleged to have had .10 of one percent or more by weight of alcohol in such driver's blood as shown by chemical analysis of blood, breath, urine or saliva, made pursuant to subdivision two or three of section eleven hundred ninety-four of this article.
>
> b. The suspension occurring under this subparagraph shall occur no later than at the conclusion of all proceedings required for the arraignment; provided, however, that if the results of any test administered pursuant to section eleven hundred ninety-four of this article are not available within such time period, the complainant police officer or other public servant shall transmit such results to the court at the time they become available, and the court shall, as soon as practicable following the receipt of such results and in

compliance with the requirements of this subparagraph, suspend such license. In order for the court to impose such suspension it must find that the accusatory instrument conforms to the requirements of section 100.40 of the criminal procedure law and there exists reasonable cause to believe that the holder operated a motor vehicle while such holder had .10 of one percent or more by weight of alcohol in his or her blood as was shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article. At the time of such license suspension the holder shall be entitled to an opportunity to make a statement regarding these two issues and to present evidence tending to rebut the court's findings.

c. Nothing contained in this subparagraph shall be construed to prohibit or limit a court from imposing any other suspension pending prosecution required or permitted by law.

d. Notwithstanding any contrary provision of this chapter, if any suspension occurring under this subparagraph has been in effect for a period of thirty days, the holder may be issued a conditional license, in accordance with section eleven hundred ninety-six of this article, provided the holder of such license is otherwise eligible to receive such conditional license. The commissioner shall prescribe by regulation the procedures for the issuance of such conditional license.

e. If the court finds that the suspension imposed

pursuant to this subparagraph will result in extreme hardship, the court must issue such suspension, but may grant a hardship privilege, which shall be issued on a form prescribed by the commissioner. For the purposes of this clause, "extreme hardship" shall mean the inability to obtain alternative means of travel to or from the licensee's employment, or to or from necessary medical treatment for the licensee or a member of the licensee's household, or if the licensee is a matriculating student enrolled in an accredited school, college or university travel to or from such licensee's school, college or university if such travel is necessary for the completion of the educational degree or certificate. The burden of proving extreme hardship shall be on the licensee who may present material and relevant evidence. A finding of extreme hardship may not be based solely upon the testimony of the licensee. In no event shall arraignment be adjourned or otherwise delayed more than three business days solely for the purpose of allowing the licensee to present evidence of extreme hardship. The court shall set forth upon the record, or otherwise set forth in writing, the factual basis for such finding. The hardship privilege shall permit the operation of a vehicle only for travel to or from the licensee's employment, or to or from necessary medical treatment for the licensee or a member of the licensee's household, or if the licensee is a matriculating student enrolled in an accredited school, college or university travel to or from such licensee's school, college or university if such travel is necessary for the completion of the educational degree or certificate.

STATEMENT OF THE CASE

On October 30, 1994, Petitioner was charged with Driving While Intoxicated, a violation of New York State Vehicle and Traffic Law § 1192(3) and Driving While Intoxicated, *per se*, a violation of Vehicle and Traffic Law § 1192(2). Pursuant to Vehicle and Traffic Law § 1193(2)(e)(7), the arraigning Court was required, at arraignment, to suspend the Petitioner's license to operate a motor vehicle in the State of New York for the duration of the prosecution. Prior to arraignment the Petitioner commenced, by summons and complaint, a separate civil action in the New York State Supreme Court for a judgment declaring Vehicle and Traffic Law § 1193(2)(e)(7) unconstitutional. In so doing, he set forth that:

> he has been denied a legally recognized property interest without Plaintiff first being afforded his right to Due Process of Law under the New York and United States Constitutions. (Complaint ¶ 9).

Petitioner, by Order to Show Cause, also moved for a preliminary injunction barring suspension of his license pending a determination by the Supreme Court of the Petitioner's constitutional challenge.

On March 17, 1995, the New York State Supreme Court (Sirkin, J.) granted the Petitioner's request for a

preliminary injunction.

Thereafter the Petitioner moved for summary judgment. The issue considered was

> whether § 1193(2)(e)(7) . . . is void on its face as violative of the Due Process and Equal Protection Clauses of the United Sates Constitution and New York State Constitution[.]" (App. p. 12).

Thereafter, on August 15, 1995, the Trial Court, as noted by the Court of Appeals, found the "prompt suspension law provides insufficient procedural protection in violation of the Due Process Clause of the Federal and State Constitutions" (App. p. 3 - 4) and granted a permanent injunction baring its enforcement against the Petitioner.

On October 5, 1995, the Commissioner of Motor Vehicles of the State of New York, pursuant to New York Civil Practice Laws and Rules (CPLR) § 5601(b)(2),[1] filed a direct appeal to the New York State Court of Appeals

> from the final Order entered September 26, 1995 which declared [New York State Vehicle and Traffic Law § 1193(2)(e)(7)] unconstitutional under the New York

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[1]CPLR § 5601(b)(2) provides a direct appeal to the Court of Appeals:

> from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

> and United States Constitutions and enjoined its enforcement. *See* Record on Appeal, p. 3.

In a decision dated June 28, 1996, (App. 1-11) the New York State Court of Appeals considered the State and Federal issues of notice and hearing, which were raised and considered below. It thereafter reversed the Trial Court and found the statute constitutional.

Petitioner's Contentions

Petitioner's first contention is notice. Relying upon precedents of this Court, the Petitioner contended before the Trial Court (*see, e.g.*, Petitioner's Second Memorandum of Law, Point I) that

> the procedure is constitutionally deficient since it provides no pre-hearing notice to the motorist that the state will seek suspension. (Petitioner's Reply Memorandum Point I[b]).

Seeking affirmance of the Trial Court Order which concurred with this contention (*see* App p. 18), Petitioner, in his Brief to the New York State Court of Appeals, maintained that

> Vehicle and Traffic Law § 1193(2)(e)(7) is unconstitutional since it does not provide the motorist with adequate notice of the proceeding. The statute is violative of Article 1 of the 14th Amendment to the United States Constitution[.] Brief on Appeal, Point I, p 1.

The statutory provision neither provides nor requires anything more than a run-of-the-mill traffic ticket to trigger the suspension procedure.

Importantly, this issue received extensive treatment by the Court of Appeals. App. p. 6.

Second, the Petitioner continuously found fault with the procedure through which the statute requires the arraigning court to make its findings. (Petitioner's eighth cause of action ¶¶ 60-66). As detailed below, the statute requires the arraigning court to first make its findings, and only after those findings have been made is the motorist permitted to offer proof on his or her own behalf. This point was extensively argued before the lower court (Petitioner's First Memorandum of Law Point III(c); Petitioner's Reply Memorandum Point I[a]) and the Court of Appeals (Brief on Appeal Point II[b]).

Although rejected, this point also received protracted treatment by the Court of Appeals. App. p. 5-6.

REASONS FOR GRANTING THE WRIT

The New York State Court of Appeals, by its decision, has dramatically departed from the rulings of this Court on the issues of notice and hearing. The decision, if permitted to stand, will result in the imposition of this blatantly unconstitutional procedure in more than 36,000 cases annually (*see*, NYLJ,

January 24, 1996, p. 1).

I. THE OPINION BELOW DIRECTLY CONFLICTS WITH THE RULINGS OF THIS COURT ON THE REQUIREMENT THAT NOTICE OF HEARING BE GIVEN

Suspension of a driver's license involves state action that adjudicates important interests of the licensee. *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). This Court has followed an unaltered course mandating, at a minimum, that the deprivation of life, liberty *or* a property interest "by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Id*, at 314.

It was uncontroverted below that Vehicle and Traffic Law § 1193(2)(e)(7) provides the motorist with no notice whatsoever of the immediate hearing to impose an indeterminate suspension of the operator's license. All that is necessary to invoke the proceeding is the issuance of a traffic citation

charging the motorist with violating *either* subdivision (2) or (3) of Vehicle and Traffic Law § 1192. Reference to subdivision (3) is not without meaning. This provision makes *no reference to a prohibited blood alcohol content.*

The Court of Appeals asserted that "the statute provides clear notice that the license suspension hearing will be held before the conclusion of all proceedings required for the arraignment." (App. p. 6).

This rationale dangerously deviates from prior decisions of this Court. In each and every case where the adequacy of notice has been raised, some sort of affirmative notice, by publication or otherwise, was considered. The Petitioner can find no case wherein this Court has found *a statute* to provide adequate notice *of the time and place of a hearing.*

If this decision is permitted to stand, the concept of notice, as forcefully and repeatedly expressed by this Court, will cease to exist. While it is an unassailable proposition that a statute can properly provide notice of conduct which should or should not be done, to permit a statute to provide notice of the time and date of a hearing utterly misses the constitutional mark:

> Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded[.] *Re Gault*, 387 U.S. 1, 33, 87 S. Ct.

1428, 18 L. Ed. 2d 527 (1967).

Even if this Court was to agree with the general proposition that a statute can provide notice, the character of the notice provided by the statute is insufficient to provide a meaningful opportunity to "marshal the facts." *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

The questioned statute merely provides that "[t]he suspension . . . shall occur no later than *at the conclusion* of *all proceedings required for the arraignment*[.]" (emphasis supplied herein). New York has no statute which mandates the period of time which must transpire between the issuance of a traffic citation and arraignment. Thus the "hearing" required under the statute could take place the next morning, at which point little opportunity will exist for preparation. Further, the Court of Appeals attempted to paste over this patent constitutional defect by observing that:

> it would be incumbent on the court to grant a driver's reasonable request for a short adjournment if necessary to marshal evidence to rebut the prima facie showing of 'reasonable cause[.]' (App. p. 7).

This position essentially makes *adequate notice dependent upon the motorist's affirmative action*. It further assumes that a motorist will know of his or her right to an adjournment and also presumes that the motorist will be cognizant of the value to

be had in seeking such an adjournment. Finally, whether the adjournment and hence "due process" will be granted has been left totally at the unfettered discretion of the arraigning magistrate.

Seeking to find notice where none exists, the Court of Appeals, citing *Commonwealth v. Crowell*, 403 Mass. 381, 529 N.E.2d 1339 (1988), also observed that "[a] person could hardly contemplate that there would be no adverse consequences flowing from test results showing a significant blood alcohol level" (App. p. 6). This statement obviously ignores the constitutional imperative, made clear by this Court, that notice, to comply with due process requirements, must "set forth the alleged misconduct with particularity." *Re Gault*, 387 U.S. 1, 33, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). Even if one assumes that the motorist is told the results of the test at the time it is given,[1] mere knowledge that one failed the test does nothing to apprise the motorist that the state will seek to impose an indeterminate suspension. Reliance upon *Crowell* further ignored the fact that Vehicle and Traffic Law § 1193(2)(e)(7) does not require the motorist to be charged with a *per se*, or blood alcohol, violation. Under no circumstance, therefore, can failing the test be deemed to "set forth the alleged misconduct with particularity." *Re Gault*, at 33.

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[1]No such requirement exists in New York.

Lastly, as noted by the Trial Court, in those situations such as the matter at bar where the *per se* violation is charged, internal inconsistencies in the statute render it difficult to determine whether the State will seek to suspend as a result of the blood alcohol content at the time of operation or at the time of arrest. *Compare*, Vehicle and Traffic Law § 1193(2)(e)(7)(a) and Vehicle and Traffic Law § 1193(2)(e)(7)(b).

II. THE OPINION BELOW DIRECTLY CONFLICTS WITH PRIOR HOLDINGS OF THIS COURT THAT REQUIRE A MEANINGFUL HEARING

It is academic that a Due Process hearing must be held in "a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965). It is plain that in its' decision, the Court of Appeals seriously compromised this basic constitutional mandate. This and the sheer number of proceedings that will be brought under this statute mandate that this Court correct the error below.

Vehicle and Traffic Law § 1193(2)(e)(7) presently provides that:

> At the time of such license suspension the holder shall be entitled to an opportunity to make *a statement* regarding these two issues and *to present evidence tending to rebut the court's findings*. (emphasis supplied herein).

Petitioner has therefore continuously maintained that the statutory format of the hearing is such that the motorist is precluded from offering evidence until *after* the hearing court has made its findings.

In its decision, the Court of Appeals seemingly recognized this statutory infirmity, however it chose to paste over the difficulty by reclassifying the findings as "tentative findings." Tentative or not, the simple fact remains that even under the interpretation afforded by the Court of Appeals, the motorist's right to offer evidence does not come into play until findings of fact have been made.

III. THE INCORRECT APPLICATION OF *MATHEWS V. ELDRIDGE* RESULTS IN A RISK OF ERRONEOUS DEPRIVATION

Paying lip service to *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the decision of the Court of Appeals nonetheless fails to demonstrate any meaningful effort to minimalize the risk of erroneous deprivation.

The second prong of the statute requires the arraigning magistrate to find reasonable cause to believe that the motorist operated a motor vehicle with .10 of one percent or more by weight of alcohol in his or her blood. While the Court of Appeals relied upon the State's concession that the results must be "certified," it is unquestioned that the statute merely requires

that *the results* be produced at arraignment. Production of *the results* does little to enable the motorist to explore the reliability and accuracy of the test itself.

It must be recognized that the Petitioner was tested upon the technologically outdated Breathalyzer® 900A which is still the test of choice in New York. (Fiandach, *New York Driving While Intoxicated, 2d,* Lawyer's Cooperative Publishing, 1996, § 23:1). It is subject to manual manipulation (Fiandach, *Handling Drunk Driving Cases 2d,* Clark, Boardman, Callaghan, 1995, § 15:15) and must be calibrated every six months "to ensure the accuracy and reliability of the instrument." (Gerstenzang, *Handling the DWI Case in New York*, West Pub. Co., 1995, § 29.9).

Since only the results of the test are presented at the putative hearing, the motorist is effectively denied the opportunity to obtain and review information on such vital questions as operator training, certification and calibration. Even the right to cross-examine appears to have been omitted from the statutory scheme. While the statute declares that the motorist may "present evidence tending to rebut the court's findings," it most certainly does not afford the driver the opportunity of cross-examination prior to the point where the Court is required to make its findings.

It was therefore ludicrous for the Court of Appeals to assert that the statute affords the driver "a meaningful

pre-suspension opportunity to rebut the chemical test results." (App. p. 8). While one might question the value of a hearing on the issue of chemical test results, the recent New York experience with fraudulently manufactured Breathalyzer® chemicals provides but one cogent basis (*see*, *People v. Uruburu*, 169 A.D.2d 20, 571 N.Y.S.2d 965 (4th Dep't 1991), *app lv den*, 78 NY2d 1082; *see also*, *People v. Serrano*, 142 Misc. 2d 1087, 539 N.Y.S.2d 845 (Sup. Ct. Kings Co. 1989).

IV. THE COURT OF APPEALS INCORRECTLY INTERPRETED THE *MATHEWS* BALANCING TEST

The third factor in the *Mathews v. Eldridge*, *supra*, balancing test is the governmental interest served. In interpreting this test, the Court of Appeals found that "the severity of the license suspension is mitigated by its temporary duration, the availability of a conditional license and hardship relief, and the substantial protection of a pre-suspension judicial hearing[.]" (App. p. 10).

Close examination demonstrates serious misapplication of the *Mathews* test which, due to the growing frequency that similar statutes are adopted, warrants correction.

As set forth above, the suspension is not "temporary." It is required to remain in place pending the entire prosecution. Although the Court of Appeals found the duration of the suspension to be "always constrained by the speedy trial limits

of CPL 30.30" (App. p. 6), this provision requires nothing more than a declaration by the prosecution that it is "ready for trial." *People v. Kendzia*, 64 N.Y.2d 331, 486 N.Y.S.2d 888, 476 N.E.2d 287 (1985). It has been interpreted to exclude, among other factors, "court congestion." *People ex rel. Franklin v. Warden, Brooklyn House of Detention for Men*, 31 N.Y.2d 498, 341 N.Y.S.2d 604, 294 N.E.2d 199 (1973). "Once the District Attorney . . . effectively announc[es] his readiness for trial the operational effect of CPL 30.30 [is] exhausted." *People v. Brothers*, 50 N.Y.2d 413, 417-418, 429 N.Y.S.2d 558, 407 N.E.2d 405 (1980). The record before the Trial Court averred that in the Town of Greece, New York, "an individual may wait upwards of two years for a trial date." Affidavit of Michael Pringle in Support of Motion for a Preliminary Injunction, ¶ 26, n. 4.

As noted above, the Court of Appeals also found the availability of hardship relief and a conditional license to be pivotal. By doing so, it fell victim to the same error that plagued the lower court in *Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979). As this Court observed therein, hardship relief is "in no sense the 'controlling' factor in our decision." (*Id*, at 12).

Further, by emphasizing conditional relief, the Court of Appeals ignored the fact that the indeterminate suspension which occurs under Vehicle and Traffic Law § 1193(2)(e)(7) is

far more severe than that which is imposed in *Mackey* (90 days), or for that matter upon a conviction for the criminal charge.

Similarly bypassed by the Court of Appeals was discussion of the singularly unique hardship period. This mandatory provision withholds all driving privileges for the thirty day period which follows the arraignment. It may only be partially alleviated upon a showing of "extreme hardship"[1] and has no analog upon a conviction.[2]

The failure of the Court of Appeals to address this unique and mandatory suspensionary period clearly demonstrates that it incorrectly applied the balancing test annunciated in *Mathews v. Eldridge*, *supra*.

CONCLUSION

"The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" *Mathews v. Eldridge*, *supra*, at 348, *quoting*, *Joint Anti-Fascist Comm. v. McGrath*,

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[1]Note further that a hardship license may not be based solely upon the testimony of the licensee. *See* Vehicle and Traffic Law § 1193(2)(e)(7)(e).

[2]Following a conviction, a first-time violator in New York who possesses a valid license may receive a stay of the immediate revocation. *See* Vehicle and Traffic Law § 1193(2)(d)(2). This statutory procedure avoids imposition of the revocation prior to the issuance of a conditional license.

341 U.S. 123, 171-172, 71 S. Ct. 624, 95 L. Ed. 817 (1951). Vehicle and Traffic Law § 1193(2)(e)(7) fails in both regards.

For the foregoing reasons the petition for a writ of certiorari should be granted.

Dated : September 19, 1996

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Michael Pringle, Respondent, v. Hon. Terrance M. Wolfe, as Town Justice &c., et al., Defendants, Patricia B. Adduci, as the Commissioner of Motor Vehicles of the State of New York, Appellant.

No. 166

Court of Appeals of New York

June 28, 1996, Decided

COUNSEL: Julie S. Mereson, for appellant.
Edward L. Fiandach, for respondent.

New York State Association of Criminal Defense Lawyers, *amicus curiae*.

CIPARICK, J.:

In an effort to reduce the incidence of drunk driving on New York's roadways, the State Legislature enacted the prompt suspension law (Vehicle & Traffic Law § 1193[2][e][7]), which under certain circumstances mandates the suspension of a driver's license to operate a motor vehicle pending prosecution for driving while intoxicated. We hold that the prompt suspension law accords with due process requirements.

I.

Background

To supplement the government's arsenal in its war against drunk driving, the Legislature enacted Vehicle & Traffic Law § 1193(2)(e)(7), commonly known as the prompt suspension law

(L 1994, ch 312).[1] Designed to provide "an efficient and effective means of balancing the need to maintain safe highways for the public and the rights of the criminal defendant" (Mem of Div of Budget, Bill Jacket, L 1994, ch 312), the prompt suspension law requires the suspension, pending prosecution, of the license of a driver charged with driving while intoxicated. Specifically, the law mandates that before the conclusion of all proceedings necessary for arraignment, the judge must suspend the driver's license of a person charged with driving while intoxicated upon determining that the accusatory instrument is sufficient on its face and finding reasonable cause to believe that the driver operated a motor vehicle with a blood alcohol level in excess of .10 of one percent as evidenced by the results of a chemical test (Vehicle & Traffic Law § 1193[2][e][7][a], [b]).[2]

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[1]Although the prompt suspension law is due to expire on November 1, 1996 (*see*, L 1994, ch 312, § 7), a bill has been passed by both houses of the Legislature extending the statute's term for one year, which has been presented to the Governor for signature (*see*, 1995 NY Senate-Assembly Bill S 5792). While we note the various constitutional challenges to the prompt suspension law currently pending in the lower courts, we only have occasion to reach those issues squarely presented on this appeal.

[2]The statute provides in pertinent part:
(7) Suspension pending prosecution; excessive blood alcohol content. a. A court shall suspend a driver's license, pending prosecution, of any person charged with a violation of subdivision two or three of section eleven hundred ninety-two of this article who, at the time of arrest, is alleged to have had .10 of one percent or more by weight of alcohol in such driver's blood as shown by chemical analysis of blood, breath, urine or saliva, made pursuant to subdivision two or three of section eleven hundred ninety-four of this article.

(continued...)

Decision of the New York Court of Appeals

Michael Pringle was arrested and charged with driving while intoxicated per se and driving while intoxicated (*see*, Vehicle & Traffic Law § 1192[2], [3]). Before Pringle was arraigned on these charges, he instituted this action seeking a declaratory judgment that the prompt suspension law (Vehicle & Traffic Law § 1193[2][e][7]) is unconstitutional, and an order enjoining its enforcement against him. Supreme Court granted a preliminary injunction preventing the suspension of Pringle's license pending prosecution and thereafter granted Pringle's motion for summary judgment declaring that the prompt suspension law provides insufficient procedural protection in violation of the Due Process Clause of the Federal and State

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(...continued)

b. The suspension occurring under this subparagraph shall occur no later than at the conclusion of all proceedings required for the arraignment; provided, however, that if the results of any test administered pursuant to section eleven hundred ninety-four of this article are not available within such time period, the complainant police officer or other public servant shall transmit such results to the court at the time they become available, and the court shall, as soon as practicable following the receipt of such results and in compliance with the requirements of this subparagraph, suspend such license. In order for the court to impose such suspension it must find that the accusatory instrument conforms to the requirements of section 100.40 of the criminal procedure law and there exists reasonable cause to believe that the holder operated a motor vehicle while such holder had .10 of one percent or more by weight of alcohol in his or her blood as was shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article. At the time of such license suspension the holder shall be entitled to an opportunity to make a statement regarding these two issues and to present evidence tending to rebut the court's findings (Vehicle & Traffic Law § 1193[2][e][7][a], [b]).

Constitutions. The Commissioner appeals to this Court as of right (CPLR 5601[b][2]) and we now reverse.

II.

Procedural Due Process

It is well established that a driver's license is a substantial property interest that may not be deprived without due process of law (*see, Bell v. Burson*, 402 U.S. 535, 539). The issue on appeal, then, is what process is due to protect against the risk of erroneous deprivation (id., at 539-540; *see, Curiale v. Ardra Ins. Co.*, 1996 NY Slip Opn 114, at 8). To determine whether the temporary license deprivation worked by the prompt suspension law accords with due process requirements, we employ the balancing test articulated by the United States Supreme Court in *Mathews v. Eldridge* (424 U.S. 319, 335) and elucidated in subsequent cases upholding the procedural adequacy of driver's license suspension schemes (*see, Illinois v Batchelder*, 463 U.S. 1112; *Mackey v Montrym*, 443 U.S. 1; *Dixon v. Love*, 431 U.S. 105). We also bear in mind that the prompt suspension law, a legislative enactment, is entitled to a presumption of constitutionality, which will only be rebutted by a showing of the statute's unconstitutionality beyond a reasonable doubt (*see, City of New York v State of New York*, 76 NY2d 479, 485). The due process inquiry consists of a balancing of the following interests:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the

additional or substitute procedural requirement would entail (*Eldridge*, 424 US, at 335, *supra*).

A. *Private Interest*

To determine the impact of the prompt suspension law on the private interest at stake—which can be generally defined as the substantial interest in retaining one's license to drive pending criminal prosecution—we consider the availability and timing of a judicial hearing, the duration of the suspension, and the availability of hardship relief (*see, Mackey*, 443 US, at 11-12, *supra*). As the following analysis demonstrates, the severity of the prompt suspension law is tempered by the driver's right to a pre-suspension judicial hearing, its temporary duration, and the availability of a conditional license and hardship relief.

Under the prompt suspension law, the court must hold a suspension hearing before the conclusion of the proceedings required for arraignment and before the driver's license may be suspended (Vehicle & Traffic Law § 1193[2][e][7][b]). At the suspension hearing, the court must first determine whether the accusatory instrument is sufficient on its face and next whether there exists reasonable cause to believe that the driver operated a motor vehicle while having a blood alcohol level in excess of .10 of one percent as shown by a chemical test (*id.*). The court may not order suspension of the license unless it has in its possession the results of the chemical test, and, as the Commissioner concedes, these results must be presented to the court in certified, documented form (*see*, CPLR 4518[c]). If the judge affirms the sufficiency of the accusatory instrument and finds reasonable cause to believe the driver operated a motor vehicle with the proscribed blood alcohol level as evidenced by the documented results of a reliable chemical test, a prima facie showing for license suspension has been established.

Once the prima facie showing is made, the statute provides that the driver "shall be entitled to an opportunity to make a statement regarding these two issues and to present evidence to rebut these findings" (Vehicle & Traffic Law § 1193[2][e][7][b]). In interpreting this language, Supreme Court concluded that the statute requires that the court order the license suspension once a prima facie showing is made but before the driver is given an opportunity to present evidence—in effect denying the driver a right to be heard—which formed the basis of Supreme Court's ruling of unconstitutionality. Because it is meaningless to allow the driver to "rebut these findings" after the suspension is ordered, we reject Supreme Court's myopic reading of the statutory language and hold that the driver is entitled to present evidence to rebut the court's tentative findings before the court may order the license suspension.

Pringle further contends that the statute provides inadequate notice of the license suspension proceeding. We disagree. First, the statute provides clear notice that the license suspension hearing will be held before the conclusion of all proceedings required for the arraignment (*see, People v. Demperio*, 86 NY2d 549, 552; *see also, Commonwealth v. Crowell*, 403 Mass 381, 386 ["A person could hardly contemplate that there would be no adverse consequences flowing from test results showing a significant blood alcohol level. No specific warning concerning those consequences is constitutionally required"]). In addition, at the time of arrest, the driver is notified of the specific criminal charges and of the time and place of arraignment, eliminating any possibility that the suspension will be ordered in the driver's absence. Finally, the statute expressly provides that the driver is "entitled to an opportunity . . . to present evidence tending to rebut the court's findings," which we construe as requiring an adequate opportunity to prepare for the license suspension hearing (*see, Loretto v. Manhattan*

Teleprompter CATV Corp., 58 NY2d 143, 149; *Statutes* § 150). Thus, it would be incumbent on the court to grant a driver's reasonable request for a short adjournment if necessary to marshal evidence to rebut the prima facie showing of "reasonable cause."

Aside from the availability of a pre-suspension hearing, the impact of the license suspension is tempered by its limited duration and the availability of relief from its terms. As a general rule, the prompt suspension law mandates the suspension of full driving privileges only until the disposition of the criminal proceeding. Although subject to procedural variations throughout the State, its duration is always constrained by the speedy trial limits of CPL 30.30. After a mandatory suspension period of 30 days, moreover, the driver is entitled to apply to the Commissioner for a "conditional" license (Vehicle & Traffic Law § 1193[2][e][7][d]). The conditional license, as prescribed by Vehicle & Traffic Law § 1196, permits the operation of a motor vehicle to and from a place of employment, during the hours of employment if the job requires, to and from school, and for medical treatment, and "shall remain in effect during the term of the suspension . . . unless earlier revoked by the commissioner" (Vehicle & Traffic Law § 1196[7]).

Additionally, the statute permits the arraigning court to grant hardship relief (Vehicle & Traffic Law § 1193[2][e][7][e]). If the driver is able to present evidence in addition to his own testimony that the license suspension will cause extreme hardship, the court may grant limited driving privileges to the licensee, including the privilege to "travel to or from the licensee's employment, or to or from necessary medical treatment for the licensee or a member of the licensee's household, or if the licensee is a matriculated student enrolled in an accredited school, college or university travel to or from such

licensee's school, college or university if such travel is necessary for the completion of the educational degree or certificate" (Vehicle & Traffic Law § 1193[2][e][7][e]). Unlike the 30-day mandatory suspension period before a conditional license may be issued, hardship relief can be granted immediately upon suspension of the license.[1]

B. Risk of Erroneous Deprivation

The second factor in the *Mathews v. Eldridge* balancing test is the risk of erroneous deprivation of the driver's license through the license suspension procedure, bearing in mind that "the Due Process Clause simply does not mandate that all governmental decision making comply with standards that assure perfect, error-free determinations" (*Mackey*, 443 US, at 13, *supra*). We conclude that the risk of an erroneous deprivation under the prompt suspension law is minimal.

The court may not order suspension of the driver's license

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[1]We find unpersuasive Pringle's argument that the court's ability to grant hardship relief violates the separation of powers doctrine. In granting the relief, the judge engages in the judicial function of assessing the hardship caused by the suspension and making the judicial determination, authorized by statute, that the defendant's circumstances warrant partial relief from the suspension in the form of limited driving privileges. To the extent that the court acts in an administrative capacity, the Legislature is not prohibited by the separation of powers doctrine from conferring on the judicial branch administrative functions such as the license suspension procedure that are "'reasonably incidental to the performance of judicial duties'" (*see, Clark v. Cuomo*, 66 NY2d 185, 189 [quoting *Matter of Rosenthal v. McGoldrick*, 280 NY 11, 14]; *cf., O'Brien v Keegan*, 87 NY2d 436).

unless it has in its possession the documented results of a reliable chemical test showing that the driver's blood alcohol level was in excess of .10 of one percent (*see*, Vehicle & Traffic Law § 1193[2][e][7][b]; *cf., People v. Mertz*, 68 NY2d 136, 148). Moreover, the minimal risk of an erroneous suspension is further diminished by the driver's right to a meaningful pre-suspension opportunity to rebut the chemical test results (*see, Batchelder*, 463 US, at 1118, *supra*). Therefore, we conclude that the slight risk that the prompt suspension law will result in an erroneous deprivation does not dilute its constitutional adequacy.

C. Governmental Interest

The third factor is the importance of the State's interest served by the prompt suspension law, measured against the increased burden of providing additional procedural safeguards. The Supreme Court has recognized the States' "paramount interest" in maintaining highway safety. As a result, the States are "accorded . . . great leeway in adopting summary procedures to protect public health and safety" (*Mackey*, 443 US, at 17, *supra*).

To compel the State to provide another level of procedural protection would require plenary hearings and would effectively convert the license suspension proceeding into a trial on the merits of the underlying criminal charge (*cf., Dixon*, 431 US, at 114, *supra*). Such a procedure would be prohibitively expensive and cumbersome, and would subvert the State's compelling interest in promoting highway safety (*see, id.*, at 18 ["The summary and automatic character of the suspension sanction available under the statute is critical to attainment of (its) objectives"]). In view of the temporary duration of the license suspension, such elaborate procedural protections are not constitutionally mandated.

Decision of the New York Court of Appeals

In sum, though the private interest affected by the prompt suspension law is substantial, the severity of the license suspension is mitigated by its temporary duration, the availability of a conditional license and hardship relief, and the substantial protection of a pre-suspension judicial hearing, which militates heavily in favor of the statute's constitutionality (*see, Batchelder*, 463 US, at 1119, *supra* ["The driver's right to a hearing before he may be deprived of his license . . . accords him all of, and probably more than, the process that the Federal Constitution requires"]). Further weighing against the driver's interest in maintaining his license are the slight risk of an erroneous deprivation and the overriding State interest in "the prompt removal of a safety hazard" from its streets (*Dixon*, 431 US, at 114, *supra*). Based on the foregoing, we hold that the prompt suspension law affords the driver all the process that is constitutionally due.

III.

Vagueness

Supreme Court expressed the concern, without ruling, that the prompt suspension law is unconstitutionally vague. In that court's view, there was an "inherent problem" posed by the statutory requirement that the court suspend the license of one who "at the time of the arrest" had a blood-alcohol level over .10 of one percent (Vehicle & Traffic Law § 1193[2][e][7][a]) because "it is not a crime to be intoxicated at the time of arrest, but only at the point of operating the motor vehicle."

Due process requires that a civil statute contain "a reasonable degree of certainty so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms" (*Foss v City of Rochester*, 65 NY2d 247, 253). As the Commissioner persuasively argues, the language in clause (a) of section

1193(2)(e)(7) must be read in conjunction with clause (b), which provides that a prima facie showing for license suspension is established only when the court finds reasonable cause to believe the driver operated a motor vehicle with the proscribed blood alcohol level. The language of clause (a) does not alter this required prima facie showing and consequently does not render the statute void for vagueness.

The parties' remaining contentions have been considered and are found to be without merit.

Accordingly, the judgment of Supreme Court should be reversed, with costs, and Vehicle and Traffic Law § 1193(2)(e)(7) declared constitutional.

Opinion by Judge Ciparick. Chief Judge Kaye and Judges Simons, Bellacosa, Smith and Levine concur. Judge Titone took no part.

June 28, 1996.

UNREPORTED DECISION OF THE TRIAL COURT DECLARING VEHICLE AND TRAFFIC LAW § 1193(2)(e)(7) UNCONSTITUTIONAL

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

Michael Pringle,
Plaintiff,

vs.

Hon. Terrance M. Wolfe, as Town Justice of the Town of Walworth, Richard M. Healy, as District Attorney of the County of Wayne, and Patricia B. Adduci, as the Commissioner of Motor Vehicles of the State of New York,
Defendants.

Appearances: Fiandach & Fiandach
Edward L. Fiandach, Esq.
Attorney for Plaintiff

Dennis C. Vacco, Attorney General
Vincent M. Barone, Assistant
Attorney for Defendants

Stephen R. Sirkin, J.

The question presented for determination herein is whether Section 1193(2)(e)(7) of the New York State Vehicle and Traffic Law (New York's "prompt suspension law") which mandates suspension of a driver's license at arraignment pending prosecution of a person alleged to have been driving with a blood alcohol content of .10 of one percent or more by weight of alcohol in a driver's blood, is void on its face as violative of the due process and equal protection clauses of the United Sates Constitution and New York State Constitution and

Unreported Decision of the Trial Court Declaring Vehicle and Traffic Law § 1193(2)(e)(7) Unconstitutional

is void for vagueness. Section 1193(2)(e)(7) of the Vehicle and Traffic Law provides in relevant part as follows:

Statute omitted for purposes of reprinting herein

The plaintiff in this action was arrested and charged with, inter alia, Driving While Intoxicated and Driving While Intoxicated, per se, in violation of Vehicle and Traffic Law §1192(3) and §1192(2), respectively. Prior to plaintiff's arraignment in Walworth Town Court, he commenced the instant proceeding and sought a preliminary injunction enjoining the defendants from enforcing Vehicle and Traffic Law §1193(2)(e)(7) pending a complete determination of the action.

The instant action is for a declaratory judgment seeking an order declaring Vehicle and Traffic Law §1193(2)(e)(7) unconstitutional and forever enjoining the defendants from enforcing said statute against the plaintiff. The plaintiff brings this motion for summary judgment pursuant to CPLR §3212 seeking to strike the defendant's answer and directing an entry of summary judgment in favor of the plaintiff and against the defendant for the relief demanded in the complaint.

This Court granted a preliminary injunction in this matter pursuant to a written decision of the Court, dated March 17, 1995.

The parties have now entered into a stipulation which provides that all pleadings and proceedings previously had herein in reference to the motion for preliminary injunction, along with thirteen enumerated items be submitted in support of and in opposition to the instant motion for summary judgment and the Court has thoroughly reviewed the various items submitted by both parties pursuant to stipulation.

Unreported Decision of the Trial Court Declaring Vehicle and Traffic Law § 1193(2)(e)(7) Unconstitutional

The plaintiff alleges in his complaint, *inter alia*, that Vehicle and Traffic Law §1193(2)(e)(7) is unconstitutional as violative of the due process and equal protection clauses of the United States and New York State Constitutions and is void for vagueness.

Initially, this Court recognizes the State of New York's goal to eliminate the menace that intoxicated motorists pose to themselves and others. Toward that goal, the statute at issue in the instant case seeks to remove motorists from New York State's highways by promptly suspending driver's licenses of motorists who are charged with driving while intoxicated. The Attorney General points to empirical findings that a significant portion of the population are only deterred from operating a motor vehicle while intoxicated by the prospect of promptly losing their licenses when they are charged. However valid its goal, the statute still must comply with constitutional mandates.

Toward that end, it should be noted at the outset that there exists a strong presumption of constitutionality favoring a statute and plaintiff has the burden of establishing unconstitutionality beyond a reasonable doubt *City of New York vs. State of New York*, 76 NY2d 479 (1990).

Initially, it is not disputed that a license issued to a motorist is not to be taken away by state action without procedural due process as required by the Fourteenth Amendment [see *Dixon v. Love*, 431 US 105 (1977), and *Bell v. Burson*, 402 US 535 (1977)]. The United States Supreme Court in *Bell v. Burson* found that the interest in having a driver's license is a substantial one. In *Bell*, the Court held that the suspension of issued licenses involves state action that adjudicates important interests of the motorists and are not to be taken away without procedural due process. It further held that due process requires

that when a state seeks to suspend a motorist's license it must afford, before the suspension becomes effective, notice and opportunity for a hearing appropriate to the nature of the case.

The Court held "It is fundamental that except in emergency situations, due process requires that when a states seeks to terminate an interest such as that here involved, it must afford notice and opportunity for hearing appropriate to the nature of the case *before* the termination becomes effective " (*Bell v. Burson, supra*).

The issue then becomes what process is due to protect against an erroneous deprivation interest. The plaintiff maintains that since the suspension is a deprivation occurring within the context of a criminal proceeding a higher order of due process is required, and no punishment may be imposed upon a finding of less than a reasonable doubt.

This Court does not find it necessary to make such a finding because the statute does not pass review applying even the lower standard. In *Mackey v. Montrym*, 443 US 1 (1979) the Court found that resolution of the inquiry into what process is due to protect against an erroneous deprivation interest requires consideration of a number of factors:

> First, the private interest that will be affected by the official action; second the risk of an erroneous depredation of such interest throughout the procedures used and the probable value, if any, of additional or substitute safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 US 319, 335 (1970), as cited in *Mackey v. Montrym*, 443 US 1, 61 L.Ed.2d 321, 329 (1979).

Unreported Decision of the Trial Court Declaring Vehicle and Traffic Law § 1193(2)(e)(7) Unconstitutional

The first step in the balancing process mandated by *Eldridge* is identification of the nature and weight of the private interest affected by the official action challenged. Here, the private interest affected is the granted license to operate a motor vehicle. The Supreme Court has recognized that interest as a substantial one: "For the Commonwealth will not be able to make a driver whole for any personal inconvenience and economic hardship suffered by reason of any delay in redressing an erroneous suspension through post-suspension procedures" (*Mackey v. Montrym*, *supra* at 330). In assessing the private interest, the duration of the suspension, the availability of post-suspension review and the availability of hardship relief should all be considered. The private interest is even more substantial in the instant case, for there is no set limitation on the suspension period. Granted, hardship relief is available under the New York scheme, but only after a driver has been suspended and has presented evidence *other than his own testimony* that demonstrates his eligibility for such relief. The plaintiff argues that as a commercial truck driver, the pre-conviction restricted use license does not afford him the privilege to drive commercially.

The duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action in the private interest involved (*Mackey v. Montrym*, *supra*.) The suspension period herein is determined solely by the resolution of the criminal case. This Court recognizes that the length of the prosecution of a pending criminal case varies significantly throughout New York State. Consequently, uniformity is absolutely lacking. This Court finds significant that the Massachusetts statute that the Commissioner claims is similar to the New York Statute contains a maximum suspension period of ninety days. Further, unlike Massachusetts, the New York Statute

provides for no post-suspension review.

The second stage of the *Eldridge* inquiry requires consideration of the likelihood of an erroneous deprivation of the private interest involved as a consequence of the procedures used. It is recognized that the Due Process clause has never been construed to mandate a full, evidentiary hearing prior to the adverse official action. However, of great significance to the *Mackey* Court when addressing a license suspension statue, was the availability to the motorist *immediately* upon his suspension, an administrative hearing that provided him an opportunity for the motorist to "tell his side of the story" and to seek prompt resolution of any factual disputes. Such a procedure is not available under the New York Statute.

Procedurally, the statute dictates that:

> In order for the Court to impose such suspension it must find that the accusatory instrument conforms to the requirements of Section 110.40 of the Criminal Procedure Law and there exists reasonable cause to believe that the holder operated a motor vehicle while such holder had .10 of one percent of more by weight of alcohol in his or her blood as was shown by chemical analysis of such person' blood, breath, urine or saliva made pursuant to the provision of section eleven hundred ninety-four of this article. At the time of such license suspension the hold shall be entitled to an opportunity to make a statement regarding these two issues *and to present evidence tending to rebut the Court's findings*.

Under this statute the Court must *first* make its findings, after which the motorist is granted the opportunity to be heard. The

motorist cannot present evidence until after the Court has ruled. This procedure does not afford a motorist due process.

Further, this statute affords no adequate notice to the motorist that his or her privilege to operate a motor vehicle will be suspended. This lack of notice is in contrast with that which occurs under Vehicle and Traffic Law §1194(2)(b), the refusal revocation statue. When the state seeks to revoke the privilege of a motorist for his or her refusal to submit to a chemical test, the motorist is provided with statutory warnings which clearly apprise the motorist of the fact that his or her license will be revoked upon the failure to submit. Additionally, at arraignment and prior to the administrative hearing, the motorist is provided with a notice of refusal which contains sworn allegations of the refusal and all information pertinent to the revocation.

The third component of the *Eldridge* balancing test requires the Court to identify the governmental function involved and to weigh in the balance the state interests served by the summary procedures used, as well as the administrative and fiscal burdens, if any, that would result from the substitute procedures sought. Here, the Statute was enacted in aid of the State's purpose of protecting the safety of its people. It can hardly be disputed that the State has a valid interest in removing drunken drivers from its highways. However, there are available procedures that would also help safeguard the motorist's interests, as found in the prompt suspension law in Massachusetts.

This Court concludes that Vehicle and Traffic Law §1192(2)(e)(7) does not pass the *Eldridge* test.

The Attorney General points to the Massachusetts' prompt suspension law and Massachusetts' highest Court's validation

Unreported Decision of the Trial Court Declaring Vehicle and Traffic Law § 1193(2)(e)(7) Unconstitutional

of its constitutionality in *Commonwealth v. Crowell*, 403 Mass 381 (1988), to demonstrate the validity of New York's prompt suspension law. However, a close analysis of the Massachusetts Statute demonstrates the deficiencies in the New York Statute. An analysis of the differences in the two statutes is contained in this Court's prior decision, dated March 17, 1995.

The plaintiff also argues that the Statute is unconstitutionally vague in that it is ambiguous as to the point in time the prohibited blood alcohol content is to be measured. The arraigning Court is required to make two findings prior to suspending a motorist's license. The first, "that the accusatory instrument conforms to the requirements of §100.40 of the Criminal Procedure Law", is actually superfluous. An accusatory instrument must always be sufficient on its face.

The second finding requires the arraigning Court to make a determination as to whether:

> There exists reasonable cause to believe that the holder operated a motor vehicle while such holder had .10 of one percent or more by weight of alcohol in his or her blood as was shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of Section eleven hundred ninety four of this article.

However, the directing paragraph of the Statute declares:

> A Court shall suspend a driver's license, pending prosecution, of a person charged with a violation of subdivision two or three of Section eleven hundred ninety-two of this article who, *at the time of arrest*, is alleged to have had .10 of one percent or more by weight of alcohol in such driver's blood as shown by chemical analysis of blood, breath, urine or saliva,

made pursuant to subdivision two or three of section eleven hundred ninety-four of this article. (Emphasis added).

There is an inherent problem with this Statute, in that it requires the arraigning Court to suspend a driver's license upon a showing that at *the time of arrest* the motorist had .10 of one percent or more of alcohol by weight in his bloodstream. This Court recognizes that it is *not* a crime to be intoxicated at the time of arrest, but only at the point of operating the motor vehicle.

CONCLUSION

Based upon the foregoing, this Court concludes that §1194(2)(e)(7) of the New York Vehicle and Traffic Law is unconstitutional and the plaintiff's motion for summary judgment is granted and the defendants are forever enjoined from enforcing Vehicle and Traffic Law §1193(2)(e)(7) against the plaintiff.

This shall constitute the decision of the Court.

s/ Stephen R. Sirkin

DATED: August 15, 1995
Lyons, New York.

DECISION OF THE LOWER COURT GRANTING A PRELIMINARY INJUNCTION
164 Misc. 2d 733; 625 N.Y.S.2d 879 (1995)

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

Michael Pringle,
Plaintiff,

vs.

Hon. Terrance M. Wolfe, as Town Justice of the Town of Walworth, Richard M. Healy, as District Attorney of the County of Wayne, and Patricia B. Adduci, as the Commissioner of Motor Vehicles of the State of New York,
Defendants.

Appearances: Fiandach & Fiandach
Edward L. Fiandach, Esq.
Attorney for Plaintiff

Dennis C. Vacco, Attorney General
Vincent M. Barone, Assistant
Attorney for Defendants

Stephen R. Sirkin, J.

The plaintiff brings this action seeking to declare Vehicle and Traffic Law § 1193 (2) (e) (7) unconstitutional and seeks a preliminary injunction, pursuant to CPLR 6301, restraining enforcement of Vehicle and Traffic Law § 1193 (2) (e) (7) against the plaintiff as a result of an arrest for a violation of Vehicle and Traffic Law § 1192 (2). Plaintiff challenges Vehicle and Traffic Law § 1193 (2) (e) (7), claiming that the statute is unconstitutional based on the grounds of denial of due process, denial of equal protection and vagueness.

Decision of the Lower Court Granting a Preliminary Injunction

Section 1193 (2) (e) (7) of the Vehicle and Traffic Law provides in relevant part as follows:

Statute omitted for purposes of reprinting herein

On January 20, 1995, plaintiff obtained an order to show cause why an order should not be granted pursuant to CPLR 6301 and 6313 to prevent, restrain and permanently bar enforcement of Vehicle and Traffic Law § 1193 (2) (e) (7) against the plaintiff as a result of an arrest for a violation of Vehicle and Traffic Law § 1192 (2).

Plaintiff commenced this declaratory judgment action seeking to declare section 1193 (2) (e) (7) unconstitutional and sought a preliminary injunction pending a final determination of this action.

A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor (*see, Doe v. Axelrod*, 73 NY2d 748 [1988]; *Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 70 AD2d 1021 [3d Dept 1979]).

Turning to the first prong of the test for preliminary injunctive relief—likelihood of success on the merits—it should be noted at the outset that there exists a strong presumption of constitutionality favoring a statute and plaintiff herein has the burden of establishing unconstitutionality beyond a reasonable doubt (*City of New York v. State of New York*, 76 NY2d 479).

Initially, it is not disputed that a license issued to a motorist is

not to be taken away by State action without procedural due process as required by the Fourteenth Amendment. The Supreme Court in *Bell v. Burson* (402 US 535) found that the interest in having a driver's license is a substantial one. In *Bell*, the Court held that the suspension of issued licenses involves State action that adjudicates important interests of the motorist and are not to be taken away without procedural due process required by the Fourteenth Amendment.

It is also recognized that it is not impermissible to deny certain substantial rights to a defendant prior to his or her conviction. The imposition of bail only on conditions limiting one's activities and the conditioning of the right to be released on bail only if a bond or cash is presented as security for a defendant's appearance at trial are examples of lawful preconviction restraints on a criminal defendant.

Notwithstanding the foregoing, this court has determined that there is a likelihood that Vehicle and Traffic Law § 1193 (2) (e) (7) will be found to be violative of the due process requirement of the Fourteenth Amendment, as well as violative of the Equal Protection Clause, and unconstitutionally vague. This court determines that the plaintiff has demonstrated a likelihood of success on the merits sufficient to maintain the status quo pending the outcome of this proceeding.

This court is not convinced, as the Commissioner of Motor Vehicles submits, that Vehicle and Traffic Law § 1193 (2) (e) (7) is purely an administrative civil procedure which runs concurrently with the criminal prosecution. Regardless, the due process that is provided in this statute may not even be sufficient to safeguard a motorist's constitutional rights in the less stringent civil administrative suspension proceeding.

Decision of the Lower Court Granting a Preliminary Injunction

Of significance to this court is the statute's requirement that the arraigning court making findings of reasonable cause before the defendant is given an opportunity to make a statement tending to rebut the court's findings. This requires the arraigning court to first determine the sufficiency of the accusatory instrument; then determine if reasonable cause exists and, finally, to permit the motorist the opportunity to make a statement tending to rebut the court's findings. The statute mandates that the arraigning court make its required findings before the motorist has been afforded an opportunity to call witnesses or produce evidence. The motorist therefore has no opportunity to be heard prior to the time that the court is required to make its findings.

Of further significance is the statute's requirement of a finding that

> A court shall suspend a driver's license, pending prosecution, of any person charged with a violation of subdivision two or three of section eleven hundred ninety-two of this article, who, at the time of arrest, is alleged to have had .10 of one percent or more by weight of alcohol in such driver's blood as shown by chemical analysis of blood, breath, urine or saliva, made pursuant to subdivision two or three of section eleven hundred ninety four of this article. (Vehicle and Traffic Law § 1193 [2] [e] [7] [a]; emphasis added.)

It is not a crime to have a blood alcohol content of .10% or greater at the time of arrest. Due process requirements have not been met under this statute given the new statutory prohibition contained therein.

Additionally, Vehicle and Traffic Law § 1193 (2) (e) (7) imposes, without limitation, a suspension for the duration of the underlying pending criminal proceeding. This court recognizes that the length of the prosecution of a pending criminal case

varies widely throughout New York State. Consequently, uniformity is absolutely lacking. This court finds significant that the Massachusetts statute that the Commissioner claims is similar to the New York statute at issue herein contains a maximum suspension limitation of 90 days.

This court rejects the Commissioner's use of the case of *Commonwealth v. Crowell* (403 Mass 381, 529 NE2d 1339 [1988]) as indicative of the New York statute's constitutionality. Rather, the Massachusetts statute is demonstrative of the deficiencies in the New York statute. At issue in *Crowell* was Massachusetts General Laws, chapter 90, § 24N.[1] For instance, Vehicle and Traffic Law § 1193 (2) (e) (7) (b) merely calls for the arraigning court to find that the accusatory instrument conformed with CPL 100.40 and that "there exists reasonable cause to believe that the holder operated a motor vehicle while such holder had .10 of one percent or more by weight of alcohol in his or her blood as was shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article." In contrast, the Massachusetts statute permits the court to suspend only upon a prima facie showing and sets forth extensive documentation that is required to be presented to make a prima facie showing.

The Massachusetts statute also provides a right of review to the motorist and grants the motorist a hearing upon an independent test which discloses less than the permitted minimum.

Based upon the foregoing, this court finds that the plaintiff has

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[1]*Text of Massachusetts General Laws, chapter 90, § 24N omitted herein.*

demonstrated a reasonable likelihood of success on the merits and has met the first prong of the test for a preliminary injunction.

The second prong of the test for a preliminary injunction—the prospect of irreparable injury if the provisional remedy is withheld—has also been met herein. Vehicle and Traffic Law § 1193 (2) (e) (7) imposes an indefinite suspension of the plaintiff's driver's license. This court does not agree with the Commissioner's analysis that the plaintiff will only be without a license for 30 days. Indeed the suspension could last the duration of the pending criminal action. Given the noted important interests that a motorist has in a State-issued driver's license, this court finds that there would be irreparable injury to the plaintiff upon an indefinite suspension of his driver's license.

The third prong of the test for a preliminary injunction—a balancing of the equities tipping in the moving party's favor—weighs in favor of the plaintiff herein. This court recognizes the State's interest in creating and maintaining effective deterrents to drunk driving and eliminating drunk drivers from the State's highways. However, in the instant case, a balancing of the equities weighs in favor of the plaintiff, who stands to have his driver's license suspended indefinitely pending criminal prosecution based upon conduct that does not constitute a violation of the Vehicle and Traffic Law (i.e., having a blood alcohol content of .10% or greater at the time of arrest).

CONCLUSION

Based upon the foregoing, this court grants the preliminary injunction and the defendants are restrained and prevented

from enforcing Vehicle and Traffic Law § 1193 (2) (c) (7) against the plaintiff herein pending the determination of this action.